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Welcome to the Jungle: Rethinking the Amount in Controversy in a Petition to Vacate an Arbitration Award Under the Federal Arbitration Act

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I. INTRODUCTION

There may be fifty ways to leave your lover,[1] but there are only three predominant ways of determining the amount in controversy in a petition to vacate an arbitration award. Whether your musical tastes run to Guns N' Roses or Paul Simon, however, those three principal methods are two too many. They represent a split among the circuits, dividing courts, and sometimes even circuit panels themselves, on an important federal jurisdictional issue.

Take, for example, this recent case-in-point. On January 30, 2004, the Ninth Circuit Court of Appeals held in *Luong v. Circuit City Stores, Inc.*[2] that the amount in controversy for diversity jurisdiction purposes in a petition to vacate an arbitration award is the amount of the arbitrator's award rather than the amount sought in the underlying arbitration.[3] The opinion was one of a divided panel.[4] The Honorable Alex Kozinski dissented and argued that the court should have looked to the amount the plaintiff was demanding in the underlying arbitration.[5] On May 25, 2004, the Ninth Circuit withdrew the *Luong* opinion[6] and issued another opinion in its place.[7] This time, the now-unanimous panel found federal question jurisdiction

1. PAUL SIMON, *50 Ways to Leave Your Lover*, *on* STILL CRAZY AFTER ALL THESE YEARS (Warner Bros. 1975).

2. Luong v. Circuit City Stores, Inc., 356 F.3d 1188 (9th Cir. 2004), *withdrawn*, 368 F.3d 1113 (9th Cir. 2004).

3. *Id.* at 1194 ("Therefore, we conclude that the better rule is that the matter in controversy on a petition to vacate an arbitration award should be measured by the amount of the award.").

4. *Id.* at 1188.

5. *Id.* at 1197 (Kozinski, J., dissenting) ("In Luong's case, however, the amount in dispute between the parties is more than $178,000—the amount to which Luong claims to be entitled. If Luong persuades the district court to vacate the arbitration award, Luong will continue to press his claim for an award in that amount.").

6. Luong v. Circuit City Stores, Inc., 368 F.3d 1113 (9th Cir. 2004).

7. Luong v. Circuit City Stores, Inc., 368 F.3d 1109 (9th Cir. 2004).

where it had not before, and ducked the amount in controversy debate altogether.[8]

The *Luong* opinion was not the beginning of the debate over the proper method for determining the amount in controversy in a petition to vacate an arbitration award under the Federal Arbitration Act. Neither was the opinion's withdrawal the end of the matter. In response to this "troubling issue,"[9] courts have adopted three different approaches for determining the amount in controversy. Some courts look to the amount of the arbitrator's award as the amount in controversy.[10] Other courts look to the amount of the original demand in arbitration so long as the party seeking vacatur requests that the district court remand the matter to arbitration.[11] One court looks to the amount of the underlying arbitration demand irrespective of whether remand is requested.[12]

The purpose of this article is to analyze the different approaches of the courts to this issue, and to consider which of these approaches best comports with the policies underlying federal diversity jurisdiction and arbitration. Part II discusses general background principles. It begins with a summary of the scope of the Federal Arbitration Act and the nature of vacatur proceedings as authorized by the Act. Part II also includes a discussion of general jurisdictional principles, and the breadth of federal jurisdiction in vacatur actions.

Part III analyzes existing federal case law regarding the amount in controversy in a petition to vacate an arbitration award under the Federal Arbitration Act. Part III includes an explanation of the three predominant methods of determining the amount in controversy, which we will call the arbitration demand, arbitration award, and remand approaches. The part also explores the potential overlap in the application of the approaches.

Part IV examines the three approaches in light of longstanding jurisdictional principles. Recognizing that the vacatur action could not exist independent of the underlying arbitration, but is a natural extension of the

8. *Id.* at 1112 ("We agree and therefore conclude that we have federal question jurisdiction over the case."); *compare Luong*, 356 F.3d at 1196 ("Nor does he establish a basis for federal question jurisdiction.").

9. Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180, 1184 (C.D. Cal. 2001).

10. *See, e.g., id.* at 1184 ("[T]he amount in controversy is equal to the arbitration award regardless of the amount sought in the underlying arbitration."); *see also* Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997) (looking to the amount of the arbitrator's award as the amount in controversy); Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) (same).

11. *See, e.g.*, Sirotsky v. NYSE, 347 F.3d 985, 989 (7th Cir. 2003) ("[T]he amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration.").

12. *See, e.g.*, Am. Guar. Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934) ("[I]t is the amount in controversy which determines jurisdiction, not the amount of the award."). As discussed *infra*, despite the cited language of the Ninth Circuit's opinion, other courts have suggested that the Ninth Circuit did not establish that the amount at issue in the underlying arbitration defines the amount in controversy in a petition to vacate. *See, e.g., Goodman*, 131 F. Supp. 2d at 1184-85.

ongoing chain of events flowing therefrom, the author posits that the approach most consistent with long lines of jurisdictional jurisprudence is to look to the original demand in arbitration. The author takes the novel approach that filing the petition to vacate is in essence an appeal of the arbitration award. Viewing the vacatur action as the appeal it is, this part concludes that, according to traditional litigation principles, the amount in controversy must be determined with reference to the original action (the arbitration demand), not the appeal (the vacatur petition).

Part V outlines the different approaches to determining the amount in controversy in light of policies underlying arbitration. The author posits that looking solely to the amount of the arbitration award fails to strike an appropriate balance between fairness and efficiency policy goals, but that the arbitration demand approach protects those principles.

But first, the general principles will be discussed.

II. THE FEDERAL ARBITRATION ACT AND THE PETITION TO VACATE AN ARBITRATION AWARD

A. The Federal Arbitration Act

For decades, litigants, courts, and commentators have recognized arbitration as an efficient and cost-effective alternative to traditional litigation.[13] Litigants have been willing to forego the "niceties" of a court,[14] and instead accept restricted discovery,[15] scant arbitral findings,[16] and

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13. *See, e.g.*, Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration*, 4 PEPP. DISP. RES. L.J. 1, 3-4 (2003). Alford asserts that:

> Arbitration is generally a faster means of resolving disputes than litigation. Parties may bypass crowded court dockets, and instead may schedule an arbitration hearing at their own time and convenience. Additionally, the informality associated with an arbitration proceeding—minimal pleading, discovery, motion practice, and other pre-trial procedures—can dramatically reduce the time to settlement or review the merits by an impartial tribunal. The limited opportunity for appeal or court review has the same effect of favoring arbitration. Furthermore, parties may choose to appoint arbitrators with professional knowledge of the matter being disputed, thus sparing the time and expense associated with educating a judge or jury. A reduced trial time may translate into cost savings as well.

Id.; *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974) (noting the Federal Arbitration Act's liberal policy favoring arbitration is to promote the efficient resolution of claims).

14. *See, e.g.*, Bell Aerospace Co. v. Local 516, Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. (UAW), 500 F.2d 921, 923 (2d Cir. 1974) ("In handling evidence an arbitrator need not follow all the niceties observed by the federal courts.").

15. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (noting that arbitration agreements are not invalid simply because discovery under the agreement "might not be as extensive as in federal courts . . . .").

16. *See, e.g.*, Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 412 (5th Cir. 1990) The court noted that:

> It has long been settled that arbitrators are not required to disclose or explain the reasons underlying an award . . . . The policy behind such a rule is manifest. If arbitrators were required to issue an opinion or otherwise detail the reasons underlying an arbitration award, the very purpose of arbitration—the provision of a relatively quick, efficient and informal means of private dispute settlement—would be markedly undermined.

limited rights of appeal[17] in order to expedite[18] and privatize[19] their disputes. Although support for arbitration has not been universal,[20] and even courts have recognized that arbitration is not a perfect path to justice,[21] contractual arbitration provisions are now standard, and arbitration proceedings customary.[22]

In 1925, the United States Congress gave a vote of confidence in the non-judicial forum of arbitration when it enacted the Federal Arbitration

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Id. (citing United Steel Workers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

17. *See, e.g.*, *id.*; Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003) ("The scope of the district court's review of an arbitral award is limited.").

18. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The court held that:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Id.; *see also* Sink v. Aden Enter., 352 F.3d 1197, 1201 (9th Cir. 2003) ("One purpose of the [Federal Arbitration Act's] liberal approach to arbitration is the efficient and expeditious resolution of claims.").

19. *See, e.g.*, Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985) ("Arbitration is, however, a private proceeding which is generally closed to the public.").

20. Pre-dispute arbitration agreements typically draw the most heat. *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 643 (1996) Sternlight asserts that:

> [W]hile binding arbitration may well be preferable from the standpoint of certain segments of society—particularly large companies that draft the terms and court administrators and judges who can reduce their own workload—there is no reason to believe that society as a whole is better off with binding arbitration. Rather, the Court's espousal of largely unregulated and unregulable mandatory binding arbitration appears likely to harm the poorest and least educated members of society.

Id.; *see also* Paul D. Carrington, *The Dark Side of Contract Law*, 36 TRIAL 73, 76 (2000) (noting that there is nothing "inherently unjust or unreasonable about arbitration," but warning that "an arbitration clause may be merely a disguised provision" that unfairly burdens and prejudices "the weaker party who asserts a future claim . . . ").

21. *See, e.g.*, Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001) ("Arbitration is not a perfect system of justice, nor it is designed to be."); *cf.* Adkins v. Labor Ready, Inc., 303 F.3d 496, 502 (4th Cir. 2002) ("It is certainly possible that 'the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.'").

22. *See* Michael J. Brady, *The Arbitration Train That Cannot Be Stopped*, METROPOLITAN CORP. COUNSEL, June 2003, at 52. Brady asserts that:

> In the last decade, there has been a nationwide move by businesses, health-care entities, and consumers towards contractual arbitration. . . . Arbitration agreements are now common in employment contracts, installment sales contracts for goods and services, credit card relationships, securities/stock transactions, and health care admission documents, to name just a few.

Id.; Winston Wood, *Employment Arbitration Agreements Face Further Scrutiny*, WALL ST. J., Dec. 12, 2000, at A1 (noting that "[a]rbitration agreements are popular with many companies wanting to avoid the high cost of litigating employee disputes"); *cf.* Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004) ("Standard-form agreements are a fact of life, and given [section] 2 of the Federal Arbitration Act, 9 U.S.C. § 2, arbitration provisions in these contracts must be enforced unless states would refuse to enforce all off-the-shelf package deals.").

Act.[23] The Act has been recognized by the United States Supreme Court as a "liberal federal policy favoring arbitration agreements."[24] Reenacted in 1947,[25] the Act's purpose was to "reverse the longstanding judicial hostility to arbitration agreements" in English common law and American courts.[26]

Today the Federal Arbitration Act[27] applies to written agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce. . . ."[28] The Act does not require arbitration of maritime or commerce contract disputes.[29] It does provide, however, that the privately-negotiated arbitration provisions in those contracts will be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[30] The Act even provides an enforcement mechanism. It authorizes courts to order parties to arbitrate in keeping with the terms of their arbitration agreement upon petition of an aggrieved party.[31] The Act further authorizes courts to stay litigation proceedings pending the arbitration.[32]

B. The Petition to Vacate

The Federal Arbitration Act also provides a mechanism for arbitral parties to petition the "United States court" to vacate an arbitration award.[33] The Act provides that the court may vacate an award:

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23. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as 9 U.S.C. §§ 1-307 (2000)); *see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (recognizing codification).

24. *See Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (citations omitted).

25. The Act is codified as 9 U.S.C. §§ 1-307 (2000) (codified and enacted by Act of July 30, 1947, ch. 392, 61 Stat. 669).

26. *Gilmer*, 500 U.S. at 24.; *see also* Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989) ("The Act is a statement of Congressional intent in upholding private parties' arrangements for dispute resolution. Thus, the policies of the Act should be effectuated whenever possible, and federal courts should 'rigorously enforce agreements to arbitrate.'") (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).

27. For a more detailed history of arbitration and the Federal Arbitration Act, see Kenneth F. Dunham, *Binding Arbitration and Specific Performance Under the F.A.A.: Will This Marriage of Convenience Survive?*, 3 J. OF AM. ARB. (forthcoming 2004).

28. 9 U.S.C. § 2 (2000). "The requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause." Foster v. Turley, 808 F.2d 38, 40 (10th Cir. 1986).

29. *See* Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 474-75 (1989) ("[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'") (quoting 9 U.S.C. § 4 (2000)).

30. 9 U.S.C. § 2; *see also* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (quoting same).

31. 9 U.S.C. § 4. Section 4 dictates when courts may hear the application for order compelling arbitration, and also the procedures for the application and hearing. *Id.*

32. 9 U.S.C. § 3 (2000).

33. 9 U.S.C. § 10 (2002). The Act also provides that the United States court may confirm, modify, or correct the arbitration award upon proper petition of the parties. *See* 9 U.S.C. §§ 9, 11 (2000).

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[34]

Federal courts have also recognized various non-statutory grounds for vacatur, such as where the arbitrator has manifestly disregarded the law or when the arbitration award is "completely irrational."[35] The availability of non-statutory grounds varies by circuit.[36] Courts are also split over whether parties can contract for a more expansive judicial review of arbitration awards than the recognized statutory and non-statutory grounds.[37]

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34. 9 U.S.C. § 10.

35. *See, e.g.*, Coutee v. Barington Capital Group, 336 F.3d 1128, 1133 (9th Cir. 2003) ("We may vacate an arbitration award 'only if that award is completely irrational, exhibits a manifest disregard of the law, or otherwise falls within one of the grounds set forth in [the FAA].'") (citations omitted); Schoch v. InfoUSA, Inc., 341 F.3d 785, 788 (8th Cir. 2003) (recognizing "two 'extremely narrow' judicially created standards for vacating an arbitration award": when the award is "completely irrational" or "'evidence[s] a manifest disregard for the law'"); Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1289 n.9 (11th Cir. 2002) ("In addition, if no rationale was given by the arbitration panel for the award and the reviewing court can determine no rational basis for it, the award may be vacated on two non-statutory bases: (1) the award is arbitrary and capricious; or (2) enforcement of the award is contrary to public policy."); *see also* Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 757-58 (5th Cir. 1999). The court noted that:

> Most state and federal courts recognized one or more nonstatutory grounds warranting vacatur of an arbitral award, including: (1) the arbitrator's manifest disregard of the law; (2) the award's conflict with a strong public policy; (3) the award being arbitrary and capricious; (4) the award being completely irrational; or (5) the award's failure to draw its essence from the underlying contract.

Id.

36. For an in-depth discussion and critique of various non-statutory bases for vacatur, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 763-800 (1996).

37. Those courts disallowing an expanded standard of review include the Ninth and Tenth Circuits, among others. *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) ("[A] federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds,

The fact that the Federal Arbitration Act provides a mechanism for vacating arbitration awards does not automatically mean that federal courts have jurisdiction to hear the petition to vacate. Although state and federal courts have concurrent jurisdiction over such matters,[38] the great irony of the Act is that it "create[s] a body of federal substantive law,"[39] but does not itself confer jurisdiction on federal courts to hear vacatur petitions.[40] As with more traditional litigation, federal courts can only hear the petition to vacate if independent jurisdiction exists,[41] namely, federal question jurisdiction,[42] diversity jurisdiction,[43] or specific statutory authority.[44]

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and any contractual provision purporting to do so is, accordingly, legally unenforceable."); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 937 (10th Cir. 2001) ("We agree and hold that parties may not contract for expanded judicial review of arbitration awards."). Other courts, including the Third and Fifth Circuits, allow parties to contract for expanded review. *See* Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 340 (5th Cir. 2004) ("'Just as parties may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.' . . . Accordingly, this Court has consistently held that parties may modify the FAA's standard of arbitration review.") (citations omitted); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 293 (3d Cir. 2001) ("We now join with the great weight of authority and hold that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own (including by referencing state law standards)."). *See also Schoch*, 341 F.3d at 788-89 & n.3 (recognizing the split in the circuits on the issue, and, without reaching the issue, "express[ing] skepticism" as to whether contracting for expanded judicial review is permissible). Courts allowing expanded review cite the parties' right to contract for the scope of their arbitration. *See Action Indus., Inc.*, 358 F.3d at 340-41. Other courts, however, reason that allowing expanded review would undermine the judiciary's respect for the arbitral process, and constitute unfair intervention in the judicial process. *See Bowen*, 254 F.3d at 933-34.

38. *See* Perry v. Thomas, 482 U.S. 483, 489 (1987).

39. *Id.*

40. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 16 n.9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise."); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 28 1331 (1976 ed., Supp. V) or otherwise."); Harry Hoffman Printing, Inc. v. Graphic Comm., Int'l Union, Local 261, 912 F.2d 608, 611 (2d Cir. 1990) ("[S]ection 10 of the [Federal] Arbitration Act does not confer subject matter jurisdiction on a district court.").

41. *See, e.g.*, Garrett v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 882, 883 (9th Cir. 1993) (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32, in noting that "[t]he Supreme Court has consistently held that federal courts may hear claims under the Act only when there is an independent basis for federal jurisdiction"); *Harry Hoffman Printing, Inc.*, 912 F.2d at 611 ("There must be an independent basis of jurisdiction before a district court may entertain petitions under the Act.").

42. *See* 28 U.S.C. § 1331 (2004) (providing the statutory basis for federal question jurisdiction).

43. *See* 28 U.S.C. § 1332 (2004) (providing the statutory basis for diversity jurisdiction).

44. *See, e.g.*, Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1469 (11th Cir. 1997) (noting that in the context of a petition to vacate an arbitration award, the rule is "[i]n a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)").

C. Diversity Jurisdiction and the Amount in Controversy

A district court has federal question jurisdiction when the action "aris[es] under the Constitution, laws, or treaties of the United States."[45] No amount in controversy is necessary.[46]

Diversity jurisdiction is different. Diversity jurisdiction is not based on the existence of a federal question,[47] but is intended to allow an impartial forum for out-of-state litigants who may otherwise suffer from local bias in state courts.[48] While many argue that this concern is now antiquated,[49] the same requirements must still exist for diversity jurisdiction to be present: the amount in controversy must exceed $75,000,[50] and the civil action must be between parties of diverse citizenship.[51]

Whether a party has satisfied the amount in controversy requirement in a civil action brought in federal court is determined at the time the action is filed.[52] "This time-of-filing rule is hornbook law . . . ."[53] For nearly seventy years, courts have held that, in determining whether the amount in controversy requirement has been met, the sum demanded in good faith by

45. 28 U.S.C. § 1331.

46. *See id.* An amount-in-controversy requirement formerly existed but was eliminated in 1980. *See* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980).

47. *See* 28 U.S.C. § 1332(a).

48. *See* O'Brien v. AVCO Corp., 425 F.2d 1030, 1033 (2d Cir. 1969) (citing Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.)).

49. *See, e.g.*, John Conyers, Jr., *Class Action "Fairness" – A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 499 (2003) ("[T]he assumption that out-of-state defendants will be victims of prejudice in state courts—the principle underlying diversity jurisdiction—may have been valid once, but it is no longer.").

50. 28 U.S.C. § 1332(a). The $75,000 threshold is "exclusive of interest and costs." *Id.* "The first congressional grant to district courts to take suits between citizens of different States fixed the requirement for the jurisdictional amount in controversy at $500." Snyder v. Harris, 394 U.S. 332, 334 (1969) (citing the Judiciary Act of 1789 § 11, 1 Stat. 78 (1789)). Congress raised the minimum amount in controversy to $2,000 in 1887 (Act of Mar. 3, 1887, ch. 373, 24 Stat. 552 (1887)); to $3,000 in 1911 (Act of Mar. 3, 1911, 36 Stat. 1091, 1091 (1911)); to $10,000 in 1958 (Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415 (1958)); to $50,000 in 1988 (Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988)); and finally to $75,000 in 1996 (Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996)).

51. 28 U.S.C. § 1332(a). The statute specifically provides that the civil action must be between:

> (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. According to the complete diversity rule, "each defendant must be diverse from each plaintiff." Riley v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1337 (11th Cir. 2002).

52. Grupo Dataflux v. Atlas Global Group, L.P., 124 S. Ct. 1920, 1924 (2004).

53. *Id.*; *see also* FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 3.25 (5th ed. 2001) ("The amount in controversy in diversity cases is determined by reference to the claim stated and the demand for relief.").

the plaintiff controls.[54] Parties seeking to overcome this general rule must prove to a "legal certainty" that the asserted claim is really for less than the required jurisdictional amount.[55] Once jurisdiction is established, subsequent events in the litigation that alter the amount in controversy will not divest the court of jurisdiction.[56] Even on appeal, the time-of-filing rule mandates that "challenges to subject-matter jurisdiction premised upon diversity of citizenship" are measured "against the state of facts that existed at the time of filing . . . ."[57]

While the amount in controversy requirement is often fairly straightforward to apply in a traditional litigation setting, it presents a new and interesting challenge in the context of a petition to vacate an arbitration award.

III. DETERMINING THE AMOUNT IN CONTROVERSY IN A PETITION TO VACATE AN ARBITRATION AWARD – THE "TROUBLING ISSUE"

Determining the amount in controversy in a petition to vacate an arbitration award has proven to be no simple matter. Over the past seventy or more years, courts have struggled with this issue. Arbitration proceedings and petitions to vacate present unique statutory and common law procedures that do not fit neatly into any traditional litigation framework.[58] The matter is complicated by the tension between the continuing judicialization of

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54. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938); *see also* Horton v. Lib. Mut. Ins. Co., 367 U.S. 348, 353 (1961) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.'"); Erwin v. Allied Van Lines, Inc., 239 F. Supp. 144, 145 (W.D. Ark. 1965) ("The prayer of the complaint or the amount demanded by plaintiff determines the amount in controversy . . . .").

55. *St. Paul Mercury Indem. Co.*, 303 U.S. at 289.

56. *Id.* at 289-90 ("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."). In a related removal context, a small number of courts have held that amendments to 28 U.S.C. § 1447 supersede *St. Paul Mercury* to the extent *St. Paul Mercury* holds that a plaintiff's actions post-removal cannot divest the federal court of diversity jurisdiction. *See, e.g.*, Bailey v. Wal-Mart Stores, Inc., 981 F. Supp. 1415, 1416 (N.D. Ala. 1997); *see also* Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180, 1184-85 n.4 (C.D. Cal. 2001) (suggesting the same in dicta). The relevant amendment provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2004). Other courts have held, however, that the proposition in *St. Paul Mercury* is still good law, and not superseded by amendments to Section 1447. *See, e.g.*, Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 873 (6th Cir. 2000). Courts are also split on whether binding post-removal plaintiff stipulations to reduce the amount in controversy may divest the federal court of jurisdiction, irrespective of the Section 1447 amendments. *Compare* Moss v. Voyager Ins. Cos., 43 F. Supp. 2d 1298, 1302-04 (M.D. Ala. 1999) (mem. and order) (holding remand proper based on plaintiff's post-removal stipulation) *with* Matter of Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992) (per curiam) ("Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul* makes later filings irrelevant.").

57. *Grupo Dataflux*, 124 S. Ct. at 1924.

58. The Federal Arbitration Act's procedures for petitions to compel, confirm, modify, or vacate arbitration awards are prime examples. *See* 9 U.S.C. §§ 4, 9-11.

arbitration,[59] and the expectation that arbitration remain a non-judicial forum existing separate from the courts.[60] Fuel this fire with a statutory framework, the Federal Arbitration Act, that has been recognized as constituting substantive federal law,[61] but that does not confer independent jurisdiction on federal courts.[62] Then add one more part kerosene by creating with that statute a virtually unprecedented form of review that allows a federal district court to review – and in its discretion even remand with orders for a rehearing of – a "non-judicial" arbitrator's award.[63] The result has been a disjointed and fragmented amalgam of cases.

As one court mildly put it, courts are "not uniform" in their method for determining the amount in controversy in a petition to vacate an arbitration award.[64] Instead, federal courts have adopted three primary approaches to determining the amount in controversy. The first two tests focus on a static moment in time. One focuses on the time the demand or request for relief is made in arbitration, while the other focuses on the amount of the arbitrator's award at issue in the vacatur proceeding. The third approach, the "remand" approach, blends the first two approaches.

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59. *See, e.g.*, Stephen L. Hayford & Carroll E. Neesemann, *A Response to RUAA Critics: Codifying Modern Arbitration Law, Without Preemption*, 8 No. 4 DISP. RES. MAG. 15, 17 (Summer 2002) ("Modern arbitration has, to a degree, become judicialized, that is, it has come somewhat to resemble litigation in court."); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 39 (1999). Brunet asserts that:

> "Folklore arbitration," characterized by final and speedy fact-based awards entered by expert arbitrators after little prehearing process, has been the principal arbitration model. Several recent developments, however, have combined to undermine the folklore model and to replace it with a more innovative and flexible "contract model of arbitration." The contract model is rooted in market-based demand from sophisticated users of the arbitration option and is supplied by major arbitration providers who now make possible arbitrations containing judicialized features such as discovery, prehearing conferences, and written opinions based on legal principles.

Id.

60. *See, e.g.*, Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997) (noting that expanding judicial review of arbitration awards "would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution").

61. *See* Perry v. Thomas, 482 U.S. 483, 489 (1987).

62. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 16 n.9 (1984) ("While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise."); Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25 n.32 (1983). The court in *Moses H. Cone Mem'l Hosp.* held that:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. IV) or otherwise.

Moses H. Cone Mem'l Hosp., 460 U.S. at 25 n.32; Harry Hoffman Printing, Inc. v. Graphic Comm., Int'l Union, Local 261, 912 F.2d 608, 611 (2d Cir. 1990) ("Section 10 of the [Federal] Arbitration Act does not confer subject matter jurisdiction on a district court.").

63. *See* 9 U.S.C. § 10(b) (defining district courts' discretion to order a rehearing).

64. Choice Hotels, Int'l, Inc. v. Felizardo, 278 F. Supp. 2d 590, 593 (D. Md. 2003).

A. The Arbitration Award Approach

The first and most common approach to determining the amount in controversy in a petition to vacate an arbitration award is to look at the amount of the arbitrator's award (the "arbitration award" approach). The Central District of California in *Goodman v. CIBC Oppenheimer & Co.*[65] gave what is arguably the clearest definition of the arbitration award approach.[66] In *Goodman*, plaintiff Michael Goodman petitioned the court to vacate an arbitration award after the arbitration panel awarded him only $74,030.75 of the $3 million he demanded.[67] Goodman claimed that the arbitrators "manifestly disregarded the law."[68]

The Central District held that it did not have jurisdiction to hear the merits of Goodman's petition.[69] In examining diversity jurisdiction, the court considered the "troubling issue"[70] of what constitutes the amount in controversy, the $3 million arbitration demand, or the $74,030.75 arbitration award.[71] The court held that the appropriate measure was the arbitration award.[72] The court looked to the Sixth and Eleventh Circuits, and relied on the classic definition of the arbitration award approach: "the amount in controversy is equal to the arbitration award regardless of the amount sought in the underlying arbitration."[73] Since the amount of the award did not meet the statutory minimum amount in controversy, the court dismissed the petition for lack of jurisdiction.[74]

As the Central District of California recognized, both the Sixth and Eleventh Circuits have looked to the amount of the arbitral award to determine the amount in controversy.[75] In *Ford v. Hamilton Investments, Inc.*,[76] the Sixth Circuit heard an appeal of a district court order denying Ford's motion to vacate an arbitration award, and granting Hamilton Investments' motion to confirm the award.[77] The amount of the award was $26,666.63, plus $3,857.53 in interest.[78] Ford had originally alleged counterclaims for more than $50,000, but was awarded nothing on those claims.[79]

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65. 131 F. Supp. 2d 1180 (C.D. Cal. 2001).
66. *See id.*
67. *Id.* at 1181-82.
68. *Id.* at 1182.
69. *Id.* at 1182, 1185.
70. *Id.* at 1184.
71. *Id.* at 1182, 1184.
72. *Id.* at 1184.
73. *Id.*
74. *Id.* at 1184-85.
75. *See* Ford v. Hamilton Invs., Inc., 29 F.3d 255 (6th Cir. 1994); Baltin v. Alaron Trading Corp., 128 F.3d 1466 (11th Cir. 1997).
76. *Ford*, 29 F.3d at 255.
77. *Id.* at 257.
78. *Id.*
79. *Id.* at 257, 260.

The Sixth Circuit held that the district court was without jurisdiction to hear the petitions to vacate and confirm.[80] Looking only to the amount of the award, and not the amount originally sought by Ford in the arbitration, the court reasoned that "[a] claim for vacation of an arbitral award in the amount of $50,000 or less is not sufficient for diversity jurisdiction."[81] The Sixth Circuit remanded the case to the district court to vacate its confirmation order and dismiss the appeal for want of jurisdiction.[82]

Less than three years later, the Eleventh Circuit tackled a similar issue in *Baltin v. Alaron Trading Corp.*[83] In *Baltin*, Alaron Trading Corporation sued the Baltins in Illinois state court after the Baltins would not accept a trade in their brokerage account.[84] The refusal to accept the trade was allegedly in violation of the Baltins' brokerage agreement with Alaron's predecessor.[85] Alaron sought actual damages of $19,921.36, punitive damages in the amount of $50,000, attorney's fees, and costs and interest.[86] The Baltins successfully compelled arbitration of the dispute in Florida, and stayed the state court action.[87] Ultimately the arbitration tribunal awarded Alaron $36,284.36.[88] The Baltins moved the United States District Court for the Southern District of Florida to vacate, or alternatively to correct or modify, the arbitration award.[89] On Alaron's motion, the district court dismissed the action to vacate based on a forum selection clause in the arbitration agreement.[90]

Affirming the dismissal on other grounds, the Eleventh Circuit held that the district court did not have jurisdiction to hear the petition to vacate.[91] As with the Sixth Circuit in *Ford*, the court looked only to the amount of the arbitrator's award that the Baltins sought to vacate.[92] The Court concluded that this amount did not meet the then-$50,000 amount in controversy required for diversity jurisdiction.[93]

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80. *Id.* at 260.

81. *Id.* At the time of the *Ford* opinion, the amount in controversy requirement was $50,000. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642 (1988).

82. *Ford*, 29 F.3d at 260.

83. 128 F.3d 1466 (11th Cir. 1997).

84. *Id.* at 1467.

85. *Id.*

86. *Id.* at 1468.

87. *Id.* at 1467-68.

88. *Id.* at 1468.

89. *Id.* at 1467, 1468 n.2.

90. *Id.* at 1468.

91. *Id.* at 1467.

92. *Id.* at 1472.

93. *Id.*

In addition to the courts already mentioned above, the Northern District of Illinois,[94] the Northern District of Texas,[95] and the Middle District of Alabama[96] have all looked to the amount of the arbitrator's award to determine the amount in controversy in an action to vacate (or its corollary, to confirm) an arbitration award.

B. The Arbitration Demand Approach

Not all courts have adopted the arbitration award approach. One of the first courts to confront the issue of determining the amount in controversy in a petition to vacate an arbitration award was the Ninth Circuit in *American Guaranty Co. v. Caldwell*.[97] In *American Guaranty*, the Ninth Circuit heard an appeal of a district court order vacating an arbitration award.[98] The appeal followed a tortured history of removal, multiple arbitration awards, and vacaturs.[99]

Addressing the issue of the district court's jurisdiction, the Ninth Circuit held that jurisdiction existed to hear the vacatur petition because "[i]n addition to the record showing this original award of $32,500, it further discloses that evidence had been offered showing appellee had suffered damages in excess of $100,000, and in one of its answers appellant claims an indebtedness by way of offset of $5,525."[100] In defining an issue that courts would debate for the next seventy years, the court further held that, "[i]t is the amount in controversy which determines jurisdiction, not the amount of the award."[101]

With this statement, the Ninth Circuit delineated for the first time what we will refer to as the "arbitration demand" approach to determining the amount in controversy in a petition to vacate an arbitration award. This

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94. Sirotsky v. NYSE, 2002 U.S. Dist. WL 1052029, at *4 (N.D. Ill. May 20, 2002) (mem.) ("Because Plaintiff petitioned the state court to vacate the previous arbitration award and did not seek an order requiring the rehearing of her arbitration claim, the amount in controversy in this case is limited to the $4,800 in forum fees assessed against her by the arbitration panel.").

95. Mannesmann Dematic Corp. v. Phillips Getschow Co., 2001 U.S. Dist. WL 282796, at *2 (N.D. Tex. March 16, 2001) (mem.) ("Under the authority of these cases, Mannesmann's motion to confirm the arbitration award must be dismissed because the amount in controversy – the actual net attorneys' fees award of $64,035 – is less than $75,000.").

96. Evergreen Forest Prods. of Ga., L.L.C. v. Bank of America, N.A., 262 F. Supp. 2d 1297, 1308 (M.D. Ala. 2003) (mem.) ("In the end, the Plaintiff requests that this court vacate an arbitration award that exceeds $75,000.00, therefore the amount-in-controversy requirement is met in this case.").

97. 72 F.2d 209 (9th Cir. 1934).

98. *Id.* at 210-12.

99. The West Summary preceding the case illustrates the case's tortured history: "From orders vacating orders denying motions to vacate and vacating an award made on rehearing after vacation of the original award and an order denying a motion to vacate the order vacating the second award and grant a rehearing and new trial, the guaranty company appeals." *See* West Summary preceding the *American Guaranty* opinion, *available at* http://web2.westlaw.com/find/default.wl?RS=WLW4.10&VR=2.0&FN=_top&SV=Split&MT=LawSchool&RP=%2ffind%2fdefault.wl&Cite=72+F.2d+209+ (last visited Nov. 2, 2004).

100. *Am. Guar.*, 72 F.2d at 211. At the time of the *American Guaranty* opinion, the amount in controversy requirement was $3,000. *See* Snyder v. Harris, 394 U.S. 332, 334 (1969).

101. *Am. Guar.*, 72 F.2d at 211.

approach centers on looking to the amount sought in the underlying arbitration irrespective of the amount of the award.[102]

Admittedly, whether the Ninth Circuit intended to adopt the arbitration demand approach wholesale is the subject of some debate. In *Goodman v. CIBC Oppenheimer & Co.*,[103] District Judge Feess distinguished the Ninth Circuit's holding in *American Guaranty* to reach the conclusion that the arbitration award approach is proper.[104] The *Goodman* court implied that the *American Guaranty* case does not stand for the proposition that the arbitration demand approach is the rule of law in the Ninth Circuit.[105] Recognizing the language in the *American Guaranty* opinion that "[i]t is the amount in controversy which determines jurisdiction, not the amount of the award,"[106] Judge Feess opined that one could only "infer" that this "uncertain" statement means that the amount sought in the underlying arbitration constitutes the amount in controversy, and that the true significance of the statement is not clear.[107] By adopting the arbitration award approach, Judge Feess implicitly dismissed the proposition that such an inference would be accurate.[108]

The Ninth Circuit itself raised question marks about the scope of the arbitration demand approach in the Ninth Circuit when, in early 2004, it issued a divided opinion adopting the arbitration award approach,[109] but then withdrew that opinion some five months later.[110] As discussed earlier, in *Luong v. Circuit City Stores, Inc.*,[111] Luong filed a petition to vacate an arbitration award of zero dollars in Circuit City's favor.[112] The U.S. District Court for the Central District of California looked to the amount of the arbitration award in determining the amount in controversy, and on that basis dismissed the petition for lack of jurisdiction.[113]

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102. *See id.*; *see also supra* note 12 and accompanying text.

103. 131 F. Supp. 2d 1180 (C.D. Cal. 2001).

104. *Id.* at 1184.

105. *Id.*

106. *Am. Guar.*, 72 F.2d at 211.

107. *Goodman*, 131 F. Supp. 2d at 1184.

108. *See supra* notes 104-05 and accompanying text. In distinguishing the *American Guaranty* case, and perhaps in justifying its following the arbitration award approach, the Central District also cited the unique procedural posture of the *American Guaranty* case. The amount in controversy was less than the jurisdictional minimum, but that case had already been to the district court previously on a petition to confirm when the amount of the award was above the jurisdictional minimum, after which the federal courts could not lose jurisdiction. *See Goodman*, 131 F. Supp. 2d at 1184.

109. Luong v. Circuit City Stores, Inc., 356 F.3d 1188 (9th Cir. 2004), *withdrawn*, 368 F.3d 1113 (9th Cir. 2004).

110. Luong v. Circuit City Stores, Inc., 368 F.3d 1113 (9th Cir. 2004).

111. *Luong*, 356 F.3d at 1188.

112. *Id.* at 1190.

113. *Id.*

The Ninth Circuit affirmed[114] and adopted the arbitration award approach, stating: "[T]he matter in controversy on a petition to vacate an arbitration award should be measured by the amount of the award."[115] The court reasoned that the "vacatur proceeding must stand on its own jurisdictional feet," and the "action in which arbitration was ordered is no longer pending."[116]

Although the court recognized the apparently inconsistent *American Guaranty* opinion, it distinguished the opinion on much the same basis as had the district court in *Goodman*:

> In a passage upon which Luong particularly relies, we observed that in addition to the record showing the original award of $32,500, it also disclosed evidence that Caldwell had suffered damages greater than $100,000 and "[i]t is the amount in controversy which determines jurisdiction, not the amount of the award." Am. Guar., 72 F.2d at 211. While this remark in isolation lends support to Luong's position that the amount which counts is the amount that is claimed, it is unlikely that we meant to hold that jurisdiction turns on the amount in controversy rather than the amount of the award given the posture in which the issue arose and the context in which the remark was made. [117]

Judge Kozinski dissented,[118] arguing that the amount in controversy in the vacatur action should have been determined by the amount Luong was claiming entitlement to in the underlying arbitration.[119] In addressing the *American Guaranty* ruling, Judge Kozinski opined that the language in the opinion is the rule of law, not "idle chatter" or a "meaningless distraction."[120] Judge Kozinski agreed with the *Luong* majority that the *American Guaranty* court found jurisdiction because the case had already been to the federal district court when the award at issue met the statutory requirement.[121] However, Judge Kozinski also noted that this was an alternative ruling to the rule of law pronounced above, and that neither rule could be ignored.[122]

On May 25, 2004, this issue became moot when the Ninth Circuit withdrew the *Luong* opinion,[123] and issued another opinion in its place.[124]

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114. *Id.* at 1196.

115. *Id.* at 1194.

116. *Id.* at 1191.

117. *Id.* at 1192; *see also* Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180, 1184 (C.D. Cal. 2001).

118. *Luong*, 356 F.3d at 1196-98.

119. *Id.* at 1197 ("In Luong's case, however, the amount in dispute between the parties is more than $178,000—the amount to which Luong claims to be entitled. If Luong persuades the district court to vacate the arbitration award, Luong will continue to press his claim for an award in that amount.").

120. *Id.* at 1196.

121. *Id.* at 1196-97.

122. *Id.*

123. Luong v. Circuit City Stores, Inc., 368 F.3d 1113 (9th Cir. 2004) (order).

This time the now-unanimous panel found federal question jurisdiction where it had not before, and successfully avoided the amount in controversy debate altogether.[125]

Whether the Ninth Circuit will cling to the arbitration demand approach or side with the arbitration award approach when the court again faces this issue remains to be seen. The language of the *American Guaranty* opinion appears unambiguous in adopting the arbitration demand approach.[126] Nevertheless, the outcome may turn on the makeup of the panel hearing the issue when it arises again. Assuming the judges who already heard the issue have not changed their positions, the issue currently appears to have at least two votes in favor of the arbitration award approach.[127]

Since the Ninth Circuit recognized the arbitration demand approach in *American Guaranty*, the First Circuit in *Bull HN Information Systems, Inc. v. Hutson*[128] has followed the arbitration demand approach, but only in the context of a partial arbitration award.[129] In *Bull HN Information Systems*, the arbitration had been bifurcated, and only a portion of the bifurcated proceedings were before the federal court.[130] Issues with a potential value of more than $75,000 had yet to be arbitrated.[131]

In examining whether diversity jurisdiction existed, the First Circuit held that the amount in controversy had been satisfied: "When a bifurcated arbitration results in a partial award and enforcement proceedings under the FAA are brought as to the partial award, we think the better rule is to measure the amount in controversy by the amount at stake in the entire arbitration."[132] The court reasoned that holding otherwise would cause parties to suffer a loss of federal jurisdiction for relying on bifurcation, a procedure meant to simplify, not complicate, proceedings.[133]

Although the First Circuit did not reach the issue of whether the arbitration demand approach is appropriate outside of the partial award context,[134] it did recognize arguments in favor of that approach.[135]

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124. Luong v. Circuit City Stores, Inc., 368 F.3d 1109 (9th Cir. 2004).

125. *Id.* at 1112 ("We agree and therefore conclude that we have federal question jurisdiction over the case."); *cf. Luong*, 356 F.3d at 1196 ("Nor does he establish a basis for federal question jurisdiction.").

126. Am. Guar. Co. v. Caldwell, 72 F.2d 209, 211 (9th Cir. 1934).

127. *See Luong*, 356 F.3d at 1188-96.

128. 229 F.3d 321 (1st Cir. 2000).

129. *Id.* at 324, 329.

130. *Id.*

131. *Id.* at 329.

132. *Id.*

133. *Id.*

134. *Id.* In explaining why it would not reach the issue, the court noted:

> Hidden in the issue is another issue which we note but do not resolve. That is whether the amount requirement is met where the sums at issue before the arbitrator at the start of the arbitration exceed $75,000, the final (non-partial) award is for less than $75,000, and the

Analogizing the arbitration proceedings to traditional litigation, the First Circuit posited that looking to anything other than the original arbitration demand could undermine arbitration policies.[136] For instance, it could result in "a loss of diversity jurisdiction that would have otherwise been present if the case had been litigated rather than arbitrated (or even if a motion to compel arbitration had been brought)."[137]

C. The "Remand" Approach

The *Bull HN Information Systems* court did not rely exclusively on the arbitration demand approach, however.[138] The court also held that it was proper to look to the amount at issue in the underlying arbitration because the party seeking vacatur had also requested a remand: "the remand sought as to the commissions alone meant that Hutson might recover the sums he sought, in excess of $75,000 . . . ."[139]

This we will refer to as the "remand approach." A sort of hybrid of the first two approaches, the remand approach to determining the amount in controversy looks to the underlying arbitration demand, but only when the request to vacate includes a request for remand.[140]

Most recently, the Seventh Circuit in *Sirotsky v. NYSE*[141] provided the classic definition of the remand approach: "[T]he amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration."[142] The Seventh Circuit also recognized the classic justification for the remand approach: if the plaintiff were to obtain a remand, then the amount at issue in the renewed arbitration, and thus the amount still at issue between the parties, would be the amount sought in the original arbitration.[143]

That same year, in *Choice Hotels International, Inc. v. Felizardo*,[144] the United States District Court for the District of Maryland looked to the amount sought in the underlying arbitration in determining that it had diversity jurisdiction; the court relied on the fact that Choice Hotels sought a

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federal judicial relief sought is merely vacating and dismissing or merely confirming the award. (We put to one side for now the fact that the award here was only a partial award.)

Id.

135. *Id.*

136. *Id.*

137. *Id.* The court also identified arguments in favor of the arbitration award approach:

There is an argument for the other view. It proceeds on the basis that arbitration is independent of judicial proceedings, that enforcement jurisdiction is not given by the FAA but must be established independently, and that the "legal certainty" that plaintiff's claim is less than the jurisdictional amount is established by the arbitral award.

Id.

138. *Id.*

139. *Id.*

140. *See, e.g., infra* notes 142-45 and accompanying text.

141. 347 F.3d 985 (7th Cir. 2003).

142. *Id.* at 989.

143. *Id.* at 988.

144. 278 F. Supp. 2d 590 (D. Md. 2003).

remand for rehearing when it filed its request to vacate the underlying arbitration award.[145] In fact, in a move the court itself described as "not entirely free from doubt," the court combined the amount of the award the moving party sought to avoid with the amount the moving party sought on remand to reach the $75,000 threshold.[146]

The Seventh Circuit and District of Maryland were not the first courts to look to the remand approach. Twelve years earlier, the Southern District of New York, in *Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[147] was one of the earlier courts to apply the remand approach.[148] In *Hough*, the plaintiffs petitioned the federal district court to vacate or modify an arbitral award arising out of a securities dispute and to remand the matter to the arbitration panel for a rehearing.[149] The defendant moved to dismiss for lack of jurisdiction.[150] The defendant argued in part that the requisite amount in controversy had not been met to satisfy diversity jurisdiction requirements.[151]

The court disagreed, and held that jurisdiction existed.[152] In concluding that the amount in controversy had been satisfied, the court looked to "the full amount of the original claim which was resolved by the arbitration award."[153] The court followed the standard reasoning for the remand approach: "Since an arbitration panel upon a rehearing of the case could award plaintiffs damages for alleged violations of antitrust laws arising from their domestic contract dispute, we cannot say 'to a legal certainty' that the amount claimed by plaintiffs is less than the jurisdictional minimum."[154]

The next year, the District of Massachusetts adopted the same remand approach,[155] but reached a different conclusion because of the facts:

> As this motion is, in part, *a motion to vacate the arbitration award* and to remand for rehearing, the Court will look to the possible award that might result from the desired *rehearing* . . . . Under plaintiff's best case, if this court were to grant the relief requested, *and* plaintiff, after rehearing before arbitration panel, obtained all

145. *Id.* at 592.
146. *Id.* at 593-94.
147. 757 F. Supp. 283 (S.D.N.Y. 1991).
148. *Id.* at 286-87.
149. *Id.* at 285.
150. *Id.*
151. *Id.*
152. *Id.* at 286-87.
153. *Id.*
154. *Id.* at 287.
155. Giangrande v. Shearson Lehman/E.F. Hutton, 803 F. Supp. 464, 467-68 (D. Mass. 1992).

that she sought, that would still amount only to $24,000, far less than the $50,000 required by the provisions of 28 U.S.C. § 1332.[156]

Although the Sixth and Eleventh Circuits have looked to the amount of the award in determining the amount in controversy,[157] both courts have hinted that they just might follow the remand approach if the correct circumstances were to present themselves. In *Ford*, the court stated: "In the arbitration proceedings Mr. Ford claimed more than $50,000 [the then-jurisdictional minimum amount in controversy] against Hamilton Investments, but he never asked the district court to order that the arbitrators reopen his claim against Hamilton Investments . . . ."[158] In *Baltin*, the court was even more transparent: "The Baltins did not request an award modification that would provide *the Baltins* with money. Instead, the Baltins sought merely to reduce or eliminate the arbitration award against them."[159] In each case, the court applied one approach, but suggested that in different circumstances it might apply another.

D. Approach Overlap

The *Ford* and *Baltin* opinions do more than potentially foreshadow the Sixth and Eleventh Circuits' next move on this issue. The opinions demonstrate a fundamental tenet of American jurisprudence – what seems clear in a vacuum often becomes hazy when applied. While in the abstract, each of the three approaches may appear distinct and pure, the future application of the three approaches by these courts may not be so cut and dry.

The culprit for the uncertainty is in part due to the overlap between the approaches. Because of the hybrid nature of the remand approach, it is difficult to determine definitively from only one case what approach a court is adopting. A court may look to the arbitration award approach in a case when no remand is requested; in a later case, when a remand request is in the record, that same court may look to the remand approach, as the Sixth and Eleventh Circuits have hinted they might.[160] One could view a court's doing so as abandoning the arbitration award approach for the remand approach. More likely, one may determine that the earlier opinion was consistent with the remand approach, which by implication looks to the amount of the award when remand is not requested.[161] The distinction is for all practical purposes one without a difference. Still, it demonstrates the leeway courts have to depart from a particular approach in a later case.

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156. *Id.*

157. *See* Ford v. Hamilton Inv., Inc., 29 F.3d 255, 260 (6th Cir. 1994); Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997).

158. *Ford*, 29 F.3d at 260.

159. *Baltin*, 128 F.3d at 1472 n.16.

160. *See Ford*, 29 F.3d at 260; *Baltin*, 128 F.3d at 1472.

161. *See supra* notes 157-59 and accompanying text.

The inherently factual nature of the amount in controversy determination may be the other culprit for the lack of clarity. In many cases, the courts addressing the issue of the amount in controversy in a petition to vacate have not set out a rigid rule regarding which approach they are following. Rather, one must glean the approach the court followed from the factual scenario and ultimate holding. This approach leaves more flexibility for courts in future cases and more uncertainty for litigants. Imagine this scenario: In Case A, the court holds that the amount in controversy in that case is equal to the amount of the arbitrator's award. In Case B, the same court looks to the amount sought in the underlying arbitration, even though no remand was sought in either case. In justifying the distinction, the court explains that, in Case A, it looked to the amount of the award because it was the same as the arbitration demand, or because both the award and demand were below the jurisdictional minimum, so there was no reason for looking to the demand. Unlike the scenario envisioned above, which the Sixth and Eleventh Circuits have hinted at, no court has suggested it will follow this example.[162] But again, it demonstrates the latitude of courts on this issue.

The issue is not entirely murky, however. Some courts have fashioned rules that seem to suggest a hard and fast rule regarding which approach that

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162. In a step not too far removed from this hypothetical, Judge Kozinski in his dissent to the now-withdrawn *Luong* opinion tried to harmonize the holding of the Sixth Circuit in *Ford* with the Ninth Circuit's *American Guaranty* opinion by arguing that the amount of the award in *Ford* was the same as the amount of the controversy because the total amount that could change hands was the amount of the award. *See* Luong v. Circuit City Stores, Inc., 356 F.3d 1188, 1197 (9th Cir. 2004) (Kozinski, J., dissenting), *withdrawn*, 368 F.3d 1113 (9th Cir. 2004). In doing so, Judge Kozinski actually departs from *American Guaranty*'s implicit ruling that the amount in controversy is the amount sought in the underlying arbitration. Judge Kozinski's dissent seems to suggest what could be viewed as a fourth approach to determining the amount in controversy—or simply a modification of the arbitration demand approach—looking to the amount in controversy in the underlying arbitration unless it appears to a legal certainty at the time of the vacatur petition filing that nobody could recover more than the jurisdictional minimum.

Judge Kozinski also tried to harmonize the Eleventh Circuit opinion in *Baltin* with the Ninth Circuit's *American Guaranty* opinion by suggesting that the Eleventh Circuit actually adopted the holding of *American Guaranty*. *See Luong*, 356 F.3d at 1197 (Kozinski, J., dissenting). Referring to the *Baltin* opinion, Judge Kozinski argued that

> In a footnote, the court explained that "[t]he Baltins [against whom the arbitration award was entered] did not request an award modification that would provide *the Baltins* with money. Instead, the Baltins sought merely to reduce or eliminate the arbitration award against them." [*Baltin*, 128 F.3d] at 1472 n. 16. Clearly the Eleventh Circuit looked to the actual amount in dispute between the parties, not merely to the arbitrator's award, else what would have been the point of footnote sixteen?

Luong, 356 F.3d at 1197 (Kozinski, J., dissenting) (emphasis in original) (citing *Baltin*, 128 F.3d at 1472).

Judge Kozinski's argument is belied by other language in the *Baltin* opinion: "The maximum remedy sought by the Baltins was the vacatur of the arbitration award of $36,284.69. Diversity jurisdiction did not exist because it was a 'legal certainty' that the amount in controversy was less than $50,000, the amount required for federal diversity jurisdiction at the time the Baltins filed suit." *Baltin*, 128 F.3d at 1472. Although the point is now arguably moot given the withdrawal of the opinion, it does demonstrate the factual nature of the amount in controversy determination.

court will follow, irrespective of the specific factual circumstances.[163] Additionally, the arbitration demand approach lends itself more to a bright line, or at least less fungible, rule.[164] Other than in the extreme example set forth above, one court could not consistently apply the arbitration demand approach in one case, and then apply the arbitration award approach in another case, or vice versa. The two approaches are opposite sides of the same coin. For the same reason, one court could not be internally consistent by applying the arbitration demand approach in one case, and the remand approach in the next. The underlying premise of the remand approach is that, when remand is not sought, the court looks to the arbitration award, which is again inconsistent with the arbitration demand approach.[165] Additionally, there would be no need to apply the remand approach in a case after already applying the arbitration demand approach in an earlier case. The second case either: (1) would apply an inconsistent test by looking to the award if no remand were requested, or, (2) if remand were requested, would imply the same inconsistent assumption by suggesting that the arbitration demand was the proper measuring stick only because the remand was sought.

That being said, how consistently the courts apply each of these tests has not been tested, as no court has had the opportunity to address the issue twice. The only exception is the Ninth Circuit, which withdrew the second opinion.[166]

One matter does seem clear, however. The issue does not have to create so much uncertainty for litigants and their lawyers. As explained below, courts could adopt the arbitration demand approach because it best protects fundamental jurisdictional principles, and properly balances the efficiency and fairness policies underlying arbitration. Each of these principles is discussed in more detail below.

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163. *See, e.g.*, Goodman v. CIBC Oppenheimer & Co., 131 F. Supp. 2d 1180, 1184 (C.D. Cal. 2001) ("[T]he amount in controversy is equal to the arbitration award regardless of the amount sought in the underlying arbitration.").

164. One exception to the bright line nature of the arbitration demand approach is the case when remand is sought of a partial arbitration award in bifurcated proceedings, as was the case in *Bull HN Information Systems*. *See* Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000). In those circumstances, the court consistently argued for the application of the remand approach because remand had been sought, while the partial award alone allowed the court to look back to the amount that would still be sought in the remaining arbitration proceedings irrespective of the requested remand. *See id.* One could argue that the bifurcated proceedings scenario is not a true exception because it is not a pure example of the arbitration demand approach. Whether one calls it a pure or hybrid arbitration demand approach, however, is in practically speaking nothing more than an issue of semantics.

165. *See, e.g.*, Sirotzky v. NYSE, 347 F.3d 985, 989 (7th Cir. 2003) (concluding that "the amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, *provided the plaintiff is seeking to reopen the arbitration* . . . .") (emphasis added); *see also Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 260 (6th Cir. 1994) (looking to the arbitration award and noting that Ford "never asked the district court to order that the arbitrators reopen his claim against Hamilton Investments").

166. Luong v. Circuit City Stores, Inc., 356 F.3d 1188 (9th Cir. 2004), *withdrawn*, 368 F.3d 1113 (9th Cir. 2004).

IV. PROTECTING JURISDICTIONAL PRINCIPLES

A. The Amount in Controversy is Determined by the Plaintiff's Good Faith Demand at the Initiation of the Action

A natural starting point for an analysis of the determination of the amount in controversy is the initiation of the action or "controversy" itself. To be consistent with the seventy-year-old "legal certainty" doctrine, and its corollary "time of filing" rule, the amount in controversy should be determined by the plaintiff's good faith demand at the initiation of the action.[167] In a petition to vacate an arbitration award, there are only two options for when the requisite action begins: the demand in arbitration or the petition to vacate the award.[168]

With that in mind, the elephant in the room is the fact that, for all practical purposes, the "action" that initiates the proceedings, and thus the action that should trigger the amount in controversy determination, is the original demand in arbitration rather than the petition to vacate the arbitration award. The petition to vacate is not a new and distinct controversy, but merely a step in the chain of events beginning with the filing of the original action in arbitration.[169] The petition to vacate necessarily would not and could not exist independent of the underlying arbitration.[170] Indeed, the petition to vacate more resembles an appeal than a new controversy.

B. The Amount in Controversy is Not Determined by the Amount on Appeal

The court hearing the petition to vacate does not serve the traditional function of a trial court that is hearing an action for the first time, but rather

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167. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); *see also* Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.'"); Erwin v. Allied Van Lines, Inc., 239 F. Supp. 144, 145 (W.D. Ark. 1965) ("The prayer of the complaint or the amount demanded by plaintiff determines the amount in controversy . . . .").

168. *See supra* Part III (discussing cases applying the arbitration demand, arbitration award, and remand approaches, which look either to the demand in arbitration or the arbitration award to determine the amount in controversy).

169. *Cf.* Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000). The court acknowledged but did not reach the merits of

> analogiz[ing] this to the situation where the claim in a court complaint exceeds $75,000 but the jury awards less than $75,000. Under these circumstances, there is diversity jurisdiction. . . . The analogy would be made in recognition of the close connection between arbitration and subsequent enforcement proceedings and also to carry out the federal policies in favor of arbitration.

Id.

170. *Cf. id.*

that of an appellate court that is reviewing and passing judgment on the decision of the arbitrator.[171] Just as an appellate court can affirm, modify, or vacate the judgment of a district court,[172] so can a district court confirm, modify, or vacate the arbitrator's award.[173]

The district court hearing the petition to vacate also has the authority to remand the matter to the original or a different arbitrator for a rehearing,[174] just as an appellate court in litigation may remand to the trial court.[175] It is extraordinary and virtually unprecedented that a federal district court has the authority to remand a case to the private "jurisdiction" of arbitration.[176] This is particularly true given that, in the case of the vacatur proceeding, the district court may in its discretion direct the arbitrator to conduct a rehearing.[177] To the extent we allow the district court to perform this extraordinary function in a vacatur action, we should at least be admitting that the district court is in essence acting in an appellate capacity.[178]

The fact that the district court hearing the vacatur petition acts in a manner analogous to that of an appellate court is underscored by the fact that courts often refer to the district court's actions as a "review" of the arbitration award.[179] At least one court has recognized that the only practical difference between an appeal and the district court's review of an arbitrator's award in a vacatur action is the standard of review.[180] In *Schoch v. InfoUSA,*

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171. *See, e.g., supra* notes 33-37 and accompanying text; *infra* note 173 and accompanying text.

172. *See* 28 U.S.C. § 2106 (2000). The statute reads:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Id.

173. *See* 9 U.S.C. §§ 9, 11.

174. *See* 9 U.S.C. § 10(b).

175. *See* 28 U.S.C. § 2106 (2000).

176. *See, e.g.*, Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 476 (1983) ("The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court."); G.C. & K.B. Invs., Inc. v. Wilson, 326 F.3d 1096, 1103 (9th Cir. 2003) (holding that the Rooker-Feldman doctrine prevents a federal district court from "engag[ing] in direct appellate review of state court determinations that have previously been adjudicated in any state court"). *But cf.* Univ. of Tenn. v. Elliott, 478 U.S. 788, 796 (1986) (holding that unreviewed state administrative determination did not preclude trial de novo on Title VII claim).

177. 9 U.S.C. § 10(b).

178. *See, e.g.*, Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 n.3 (8th Cir. 2003).

179. *See, e.g.*, Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003) ("The scope of the district court's review of an arbitral award is limited."); Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru, S.R. Ltda., 256 F. Supp. 2d 594, 604 (S.D. Tex. 2002) ("A court considering an arbitration award under the FAA applies a deferential standard of review."); Mays v. Lanier Worldwide, Inc., 115 F. Supp. 2d 1330, 1334 (M.D. Ala. 2000) ("The court's review of an arbitrator's decision is governed by the Federal Arbitration Act ('FAA')."); Sargent v. Paine Webber, Jackson & Curtis, Inc., 674 F. Supp. 920, 922 (D.D.C. 1987) ("A district court has the prerogative to exercise independent review of an arbitration award under the Federal Arbitration Act.").

180. *Schoch*, 341 F.3d at 789 n.3.

Inc., the Eighth Circuit addressed the issue of whether parties to an arbitration agreement could contract for expanded review of the arbitrator's award.[181] In "expressing grave skepticism" about whether parties could expand the scope of review,[182] the court reasoned that allowing the parties to do so "would seemingly amend the FAA, crown arbitrators mini-district courts, *force federal trial courts to sit as appellate courts*, and completely transform the nature of arbitration and judicial review."[183] The Seventh Circuit seemed to agree when in the parallel context of an appeal from an action to set aside a labor arbitration award, the court recognized that a district court's determination of the merits of the arbitrator's award would "inevitably have judicialized the arbitration process . . . ."[184] The court further recognized that seeking such review from the district court "would make arbitration a three-tiered, rather than as in normal adjudication a two-tiered, process; it would make arbitration more judicial than adjudication."[185]

Tellingly, many courts disagree with this skepticism, and allow the parties to contract for expanded review,[186] thereby effectively removing the

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181. *Id.* at 788-90.

182. *Id.* at 789. The court ultimately did not reach the issue of whether arbitral parties could agree to an expanded scope of review. *Id.* Instead, the court held that, even if the parties could do so, the intent of the parties would have to be "clearly and unmistakably expressed." *Id.* The court found the language of the agreement in that case insufficient to satisfy this standard. *Id.*

183. *Id.* at 789 n.3 (emphasis added).

184. Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 183-84 (7th Cir. 1985) (following an action to set aside a labor arbitration award). The court noted:

> To this we add that for judges to have taken upon themselves to determine the correctness of the arbitrator's award would inevitably have judicialized the arbitration process, in much the same way that judicial review, even of a deferential sort, tends to judicialize the administrative process. The administrative agency must (at least when its proceedings resemble adjudication) find facts like a court, and reason like a court, if it is to withstand correction by the court. And so it would be with arbitrators if their decisions were subject to the kind of review that courts give agencies. Yet the idea of arbitration, as of administrative decision-making but more strongly since there is no counterpart in arbitration to the Administrative Procedure Act, is to provide an alternative to judicial dispute resolution, not an echo of it. If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitration panels, though they rarely do. But they cannot get such review from the federal courts—which would mean, first from the district court, and then, on appeal, from the court of appeals. This would make arbitration a three-tiered, rather than as in normal adjudication a two-tiered, process; it would make arbitration more judicial than adjudication.

Id.; *see also* Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997). The court in *Tempo Shain Corp.* cited the *Ethyl Corp.* decision and held that

> [t]he district court was correct that arbitration panel determinations are generally accorded great deference under the FAA. Judicial review of arbitration awards is necessarily narrowly limited. . . . Undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution.

Tempo Shain Corp., 120 F.3d at 19 (citing *Ethyl Corp.*, 768 F.2d at 183).

185. *Ethyl Corp.*, 768 F.2d at 184.

186. *See, e.g.*, Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 793 (5th Cir. 2002); Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001).

only distinction the Seventh and Eighth Circuits could draw between an appellate court and the district court's vacatur review.[187] Courts have even allowed the parties to contract for the same standard of review as a traditional appellate court.[188] For instance, in *Harris v. Parker College of Chiropractic*,[189] the Fifth Circuit held that the parties were entitled to contract in their arbitration agreement for a *de novo* review of pure questions of law arising out of the arbitrator's award.[190] The *de novo* standard is the same standard applied by courts of appeals reviewing a district court's determinations of law.[191] Indeed, *de novo* review is the same standard courts of appeals apply in reviewing a district court's determinations of law when refusing to vacate an arbitration award under the Federal Arbitration Act.[192]

In allowing expanded review, courts have, according to the reasoning of the Seventh and Eighth Circuits, anointed district courts as courts of appeals, performing all of the responsibilities of an appellate court, and according to the same standards.[193] The arbitration process has become "judicialized."[194]

Even in those circuits where the court has disallowed the expanded standard of review, the district court is arguably performing no less of an appellate function. While the standard of review is more restricted, at a base level the district court is still fundamentally performing the role of an appellate court.[195] It is not the standard of review that defines an appellate court's function, but the fact of review itself under whatever standard.[196] The district court is still reviewing the decision and award of the arbitrator, and potentially examining his conduct,[197] albeit under a more forgiving standard than in traditional litigation.[198]

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187. *See Schoch*, 341 F.3d at 789 n.3.

188. *See, e.g., Harris*, 286 F.3d at 793 (applying de novo review to questions of law based on the parties' arbitration agreement); Syncor Int'l Corp. v. McLeland, 120 F.3d 262, 1997 U.S. App. WL 452245, at *6 (4th Cir. Aug. 11, 1997) (unpublished) (same); Gateway Tech., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 996-97 (5th Cir. 1995) (same); *see also* New England Util. v. Hydro-Quebec, 10 F. Supp. 2d 53, 61-65 (D. Mass. 1998) (holding with reservations that arbitration provision allowing the arbitrating parties to "petition a court of competent jurisdiction for review of errors of law" was enforceable) (citations and inner quotations omitted).

189. 286 F.3d 790 (5th Cir. 2002).

190. *Id.* at 793-94.

191. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs, 367 F.3d 675, 678 (7th Cir. 2004) ("The district court's determinations of law are reviewed *de novo* and its determinations of fact are reviewed for clear error.").

192. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 948 (1995) ("We believe, however, that the majority of Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards."); Jeff D. v. Kempthorne, 365 F.3d 844, 850-51 (9th Cir. 2004) ("We review the district court's denial of a motion to vacate the judgment for an abuse of discretion. . . . We review de novo, however, any questions of law underlying the district court's decision.") (citations omitted).

193. *See supra* notes 183-85 and accompanying text.

194. *See supra* notes 59, 183-85 and accompanying text.

195. *See Schoch*, 341 F.3d at 789 n.3.

196. *See id.*

197. *See, e.g.*, 9 U.S.C. § 10(a)(1)-(4) (listing statutory bases for vacatur). Three of the statutory bases regard arbitrator misconduct, partiality, corruption, or excess of power. *See id.*

198. *See, e.g.*, Boise Cascade Corp. v. Paper-Allied Indus., 309 F.3d 1075, 1080 (8th Cir. 2002) (holding that in an action to vacate or confirm an arbitration award, a court "must accord 'an

Viewing the court hearing the vacatur action as analogous to a court sitting in an appellate capacity, longstanding jurisprudential principles dictate that the amount in controversy is not to be determined at the filing of the appellate briefs.[199] Imagine the following scenario: ABC sues DEF in federal court for $1 million. ABC receives a verdict in its favor for $72,000, and appeals to the federal appellate court. The federal appellate court dismisses the appeal because the amount in controversy is only $72,000.

Such a result would be unprecedented, violating decades of jurisprudence.[200] The amount in controversy is $1 million, assuming the complaint is filed in good faith.[201] The court then maintains jurisdiction regardless of events occurring subsequently in the litigation that reduce the amount in controversy.[202] Therefore, viewing the vacatur action as a type of appeal, the amount in controversy cannot be determined as the amount of the arbitration award a party is seeking to vacate, just as the amount in controversy in traditional litigation is not determined by the amount of the judgment being appealed.

The jurisdictional shortcomings inherent in the arbitration award approach are not solved by the remand approach to determining the amount in controversy. The remand approach dictates that one look to the original arbitration demand when remand is requested.[203] In that way, the remand approach reaches the conclusion that the arbitration demand is the proper method of determining the amount in controversy.[204] However, the remand approach presupposes that the arbitration award approach is proper when remand is not requested.[205] The remand approach, therefore, suffers from

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extraordinary level of deference' to the underlying award itself") (quoting Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996)).

199. *See* Horton v. Lib. Mut. Ins. Co., 367 U.S. 348, 353 (1961) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.'"); Erwin v. Allied Van Lines, Inc., 239 F. Supp. 144, 145 (W.D. Ark. 1965) (stating that "[t]he prayer of the complaint or the amount demanded by plaintiff determines the amount in controversy"); *see also* Fed. R. App. P. 3(a)(1) (discussing requirements for filing a notice of appeal for "[a]n appeal permitted by law as of right from a district court to a court of appeals").

200. *See supra* notes 52-57 and accompanying text.

201. *See* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); *see also supra* note 194.

202. *See St. Paul Mercury Indem. Co.*, 303 U.S. at 289-90.

203. *See, e.g.*, Sirotzky v. NYSE, 347 F.3d 985, 989 (7th Cir. 2003) ("[T]he amount in controversy in a suit challenging an arbitration award includes the matter at stake in the arbitration, provided the plaintiff is seeking to reopen the arbitration.").

204. *See id.*

205. *See id.* (limiting the approach to situations where "*the plaintiff is seeking to reopen the arbitration*") (emphasis added); *see also* Ford v. Hamilton Invs., Inc., 29 F.3d 255, 260 (6th Cir. 1994) (applying arbitration award approach but hinting it might apply the remand approach under different circumstances); Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997) (same).

the same jurisdictional infirmities as the arbitration award approach.[206] Additionally, measuring the amount in controversy by looking to the arbitration demand only when remand is requested ignores the fact that the Federal Arbitration Act grants the district court discretion to "direct a rehearing by the arbitrators" when "an award is vacated and the time within which the agreement required the award to be made has not expired . . . ."[207] Therefore, the assumption underlying the remand approach that there is a legal certainty that the amount of the arbitration award is the amount in controversy when no remand is requested[208] is not necessarily true.

Courts should not ignore fundamental jurisdictional principles in the name of arbitration. Doing so creates uncertainty. It also sets a dangerous precedent that issues even tangentially related to arbitration are not constrained by the rule of law.

C. Addressing Potential Counterarguments

One could argue that adopting the arbitration demand is not necessitated, or even contemplated, by the time of filing requirement or its analogous legal certainty test. Analogizing the petition to vacate to a motion to remand after removal to federal court, wherein the court may look to the record existing at the time of removal to ascertain if the amount in controversy has been met,[209] one could argue that the time for examining the amount in controversy is the time the dispute is brought before the federal court. However, doing so in the context of a petition to vacate an arbitration award would punish adversaries for bringing actions in arbitration rather than federal court by potentially depriving them of federal jurisdiction they would have enjoyed had they originally brought the action in federal court, where jurisdiction would have been determined at the good faith filing of the complaint.[210] Such an approach would, therefore, contravene the arbitral principle of efficiency by discouraging arbitration altogether,[211] and could

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206. *See supra* notes 204-05 and accompanying text.

207. 9 U.S.C. § 10(b).

208. *See, e.g.*, *Sirotzky*, 347 F.3d at 989; *see also Ford*, 29 F.3d at 260; *Baltin*, 128 F.3d at 1472.

209. *See, e.g.*, Wakefield v. Olcott, 983 F. Supp. 1018, 1021 (D. Kan. 1997) ("A court determines a defendant's right of removal by examining the record and the status of the pleadings at the time defendant filed its petition for removal.").

210. *See* Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000). The court asserted that:

> One approach would be to analogize this to the situation where the claim in a court complaint exceeds $75,000 but the jury awards less than $75,000. Under these circumstances, there is diversity jurisdiction. . . . A contrary result would mean a loss of diversity jurisdiction that would have otherwise been present if the case had been litigated rather than arbitrated (or even if a motion to compel arbitration had been brought).

Id.

211. *See* Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 412 (5th Cir. 1990) (recognizing "the very purpose of arbitration—the provision of a relatively quick, efficient and informal means of private dispute settlement . . . "); *see also* Sink v. Aden Enters., Inc., 352 F.3d 1197, 1201 (9th Cir. 2003) ("One purpose of the FAA's liberal approach to arbitration is the efficient and expeditious resolution of claims.").

further burden the already-overloaded federal court system.[212] Additionally, although the arbitration demand approach does not square perfectly with the legal certainty and time of filing doctrines due to its unique circumstances, it is a much better fit than to reject all notions of the doctrine by forcing a determination of the amount in controversy at the time of what is effectively an appeal. The petition to vacate is not akin to removal, does not follow the same procedures as removal, and does not result in the same outcome as removal.

One could also argue that the petition to vacate is not the same as an appeal. This argument rests on the notion that the privately-selected and employed arbitrator is not a lower court judge subject to traditional appellate review. With the continued judicialization of arbitration, and the trend among many courts to allow parties to contract for expanded review, the underlying premises of this argument (the private nature of arbitration and lack of traditional review) are not entirely valid. Furthermore, the issue is not one of treating arbitration procedures differently, but whether the courts should treat federal court diversity jurisdiction determinations differently in this context. The courts should not. To the extent the judiciary is allowing the federal courts to review arbitration awards, even if under a more forgiving standard, there is no reasoned basis for treating the determination of federal court jurisdiction differently in this context than in a traditional courtroom litigation context.

As arbitration becomes more judicialized, more overlap is going to occur with traditional principles, and thus more opportunities will present themselves to follow as closely as possible, or to completely disregard, those fundamental principles. This author suggests we follow the traditional notions to the extent possible, lest arbitration become the many-headed hydra, loosed to wreak havoc on traditional principles.

V. ON FAIRNESS AND EFFICIENCY – BALANCING FUNDAMENTAL FAIRNESS PRINCIPLES AND ARBITRATION POLICIES

Ultimately, it may not be enough in many people's eyes to argue that the arbitration process should follow traditional jurisdictional principles as closely as possible. One may argue that arbitration is by definition different

212. *See, e.g.*, Conyers, *supra* note 48, at 497. Conyers asserts that:
> The workload problem in the federal courts is currently at an acute stage. The most recent available statistics, covering 2001, indicate that federal district courts are seeing 377 civil filings per authorized judgeship each year. This figure underestimates the problem, because it includes all authorized judgeships, ignoring the fact that many remain unfilled. Chief Justice Rehnquist has criticized Congress and President Clinton for exacerbating the courts' workload problem with legislation that brought more cases into the federal system.

Id.

from federal court lawsuits, and therefore should be treated differently.[213] Although this argument contradicts the efforts by courts to maintain consistency when possible, and the continued judicialization of arbitration,[214] this idea may reflect the perception of some. Even so, traditional and fundamental principles underlying arbitration should not be dismissed so quickly. The next logical step, therefore, in determining how to calculate the amount in controversy in a petition to vacate an arbitration award, would be to determine which, if any, of the available approaches support the purposes and policy goals of arbitration.

One of the primary purposes of arbitration is to present an attractive non-judicial method for resolving disputes that is both fair and efficient.[215] If the process is not attractive, it will necessarily wither from lack of use. If not efficient, it offers little advantage over traditional litigation, and therefore provides cost with little corresponding benefit. If not fair, it cannot represent itself as an equitable alternative for providing justice.

Perhaps the most prominently cited purpose underlying arbitration is efficiency.[216] The United States Supreme Court has recognized that one purpose of the Federal Arbitration Act's liberal policy toward arbitration is to promote the efficient resolution of claims.[217] Ideally, arbitration allows parties to avoid a forum that is efficient in three ways: less expensive,[218] less time-consuming,[219] and more informal[220] than traditional litigation.

There is certainly an efficiency argument to be made in favor of the arbitration award approach. Looking only to the amount of the arbitrator's award is simple, clean, and refreshingly easy. Nobody needs to look beyond the documents that are already before the court, namely the award. No one needs to hash out when the action was filed, how much was truly demanded, and whether that demand changed over the course of the proceedings.

The efficient nature of arbitration, however, needs to be tempered by the policy of fundamental fairness, both actual and perceived.[221] If one

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213. *See generally supra* notes 13-19 and accompanying text for a discussion of the differences between traditional litigation and arbitration.

214. For a discussion of the continuing judicialization of arbitration, see Edward Brunet, *supra* note 59.

215. *See* Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474, 481 (10th Cir. 1996) (recognizing "the purpose of arbitration, namely, an efficient, inexpensive and fair resolution of the dispute").

216. *See Antwine*, 899 F.2d at 412; *see also Sink*, 352 F.3d at 1201.

217. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974).

218. *See Cogswell*, 78 F.3d at 481 (recognizing "the purpose of arbitration, namely, an efficient, inexpensive and fair resolution of the dispute").

219. *See, e.g.*, Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001) ("Arbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation.").

220. *See* Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 394 (5th Cir. 2003) ("The arbitration process is a speedy and informal alternative to litigation, and, by its very nature, is intended to resolve disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials.").

221. *See, e.g.*, McMullen v. Meijer, Inc., 355 F.3d 485, 494 n.7 (6th Cir. 2004) ("When the process used to select the arbitrator is fundamentally unfair, as in this case, the arbitral forum is not an effective substitute for a judicial forum, . . ."); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) ("Courts have interpreted [9 U.S.C.] section 10(a)(3) to mean that except where

approach for determining the amount in controversy is unfair or perceived as unfair, adoption of that approach may dissuade parties from choosing arbitration. Additionally, adoption of an unfair or perceived-unfair approach makes the determination of jurisdiction as a whole suspect. If the jurisdictional determination is suspect, then the authority of the court to make a final determination is dubious. If the authority is dubious, then the ultimate determination itself may be questionable. Simply put, whether truly unfair or not, a process that is perceived as unfair is neither attractive, nor favored.

Evaluating whether any method for determining the amount in controversy in a petition to vacate an arbitration award adequately balances fairness and efficiency so as to make for an attractive alternative to the judiciary raises three questions: (a) Does the method treat the arbitrating plaintiff equally with the defendant in arbitration?; (b) Does the method treat arbitrating parties fairly as compared to traditional litigants?; and (c) Is the process for determining the amount in controversy internally consistent? Each is discussed in turn.

A. Does the Method Treat the Arbitrating Plaintiff Equally with the Defendant in Arbitration?

The first fairness factor considers whether the judicial process offers one litigant the same opportunities as his adversary.[222] Arbitration that offers one party fewer rights than his adversary should not be considered fair. In fact, arbitration that offers even the perception of an imbalance of rights between the parties risks being labeled unfair.

The arbitration award approach raises these concerns. Absent the existence of defense counterclaims, a plaintiff is, by definition, more likely than the defendant to get an award of more than $75,000. A judgment in favor of the defense will be zero dollars, not including costs and fees. Under the arbitration award approach, the inevitable result is that the defendant will have more of an opportunity for federal court review. A defense verdict for zero dollars will never support the amount in controversy for diversity jurisdiction in a plaintiff's petition to vacate, but a plaintiff award of more than $75,000 will support diversity jurisdiction in a defendant's petition.

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fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review."); Forsythe, Int'l, N.A. v. Gibb Oil Co. of Tex., 915 F.2d 1017, 1020 (5th Cir. 1990) ("In reviewing the district court's vacatur, we posit the same question addressed by the district court: whether the arbitration proceedings were fundamentally unfair.").

222. *See, e.g.*, Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985) ("The arbitrator is the judge of the admissibility and relevancy of evidence submitted in an arbitration proceeding. . . . The arbitrator is not bound to hear all of the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and arguments.").

The notion that defendants are more likely to obtain federal review of arbitration awards is, at a base level, troubling, particularly if there is an equitable way to avoid such a result. Although a defendant's ability to obtain federal review may not be viewed as fundamentally unfair in the eyes of the court because the plaintiff can still seek review in a state court, it may be viewed by the plaintiff as a blatant inequity. Many perceive federal courts to be more knowledgeable, and less subject to hometown bias.[223] The perceived inequity that a corporate defendant can seek review of a "better" court may perpetuate the oft-cited concern that corporate defendants are using contractual arbitration provisions to their own strategic advantage. Many consider arbitration provisions in contracts (particularly those involving consumers) to be susceptible to use as tools of corporate giants who draft the arbitration provisions to their benefit and thereby force consumers into "unregulated and unregulable mandatory binding arbitration . . . ."[224] Many also subscribe to the notion that the mandatory arbitration that results from these provisions "appear[] likely to harm the poorest and least educated members of society."[225] Add to this notion the perception that the corporate defendant can then virtually assure that review of an award in favor of the plaintiff will occur in a federal court, whereas the plaintiff seeking review of a defense award will be relegated to (at least perceived) inferior courts.

If people refuse to agree to arbitration provisions because of this perceived inequity in access to federal review, then the arbitration award approach could undermine the policy of promoting non-judicial alternatives to litigation.[226] If people still arbitrate, or feel they have no choice but to arbitrate, the perceived inequities that arise during the arbitration may leave them frustrated and bitter.

In the context of a corollary petition to confirm an arbitration award, two courts have addressed a similar inequity, but in favor of the plaintiff. In

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223. *See, e.g.*, Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 375 (1992) ("The research also found that perceived bias against out-of-state litigants is still frequently reported, especially in less urban areas, and federal judges are perceived to be superior to their state court counterparts."); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are more competent and equipped to hear constitutional challenges).

224. *See, e.g.*, Sternlight, *supra* note 19, at 642. Sternlight asserts that:

> [W]hile binding arbitration may well be preferable from the standpoint of certain segments of society— particularly large companies that draft the terms and court administrators and judges who can reduce their own workload—there is no reason to believe that society as a whole is better off with binding arbitration. Rather, the Court's espousal of largely unregulated and unregulable mandatory binding arbitration appears likely to harm the poorest and least educated members of society.

Id.

225. *See id.*

226. *See, e.g.*, Towey v. Catling, 743 F. Supp. 738, 741 n.1 (D. Haw. 1990) ("This court ardently supports the arbitration of certain classes of cases as a means of reducing the ever-increasing costs of litigation, and concludes that federal policy also supports the promotion of alternative dispute resolution wherever possible."); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-511 (1974).

North American Thought Combine, Inc. v. Kelly[227] and *Doctor's Associates, Inc. v. Stuart*,[228] the Southern District of New York and District of Connecticut, respectively, recognized that a zero dollar award would never support diversity jurisdiction on a defendant's petition to confirm, while an award in favor of the plaintiff in excess of $75,000 would support diversity jurisdiction.[229] The courts acknowledged that the result would be to prevent prevailing defendants in arbitration from obtaining confirmation from a federal court.[230] In addressing this concern, the District of Connecticut in *Stuart* adopted what is essentially the arbitration demand approach in an action to confirm the arbitration award: "The amount in controversy is the difference 'between winning and losing the underlying arbitration.'"[231] While the Southern District of New York did not go so far in *Kelly* as to wholesale adopt the arbitration demand,[232] the court did recognize that, under the limited circumstances in which the *defendant* seeks to confirm an arbitration award, the court should look to the amount at issue in the underlying arbitration.[233]

Likewise, the arbitration demand approach in the context of a petition to vacate remedies any actual or perceived inequity regarding access to federal review, while respecting traditional notions regarding the amount in controversy.[234] Whether the parties will petition the federal or state court for

227. 249 F. Supp. 2d 283 (S.D.N.Y. 2003).

228. 11 F. Supp. 2d 221 (D. Conn. 1998).

229. *See id.* at 224. In *Stuart*, the court expressed its concern that

> Defendants challenge jurisdiction to confirm the award asserting that '[s]ince the arbitrator awarded no damages, the requisite amount in dispute in excess of $75,000 is not in dispute with respect to the application to confirm the arbitration award . . . .' Answer to Application to Confirm Arbitration Award ("Answer") ¶ 4. Defendants' position would effectively preclude any defendant who prevailed in an arbitration from petitioning a district court to confirm the award.

Id.; *see also Kelly*, 249 F. Supp. 2d at 285 (sharing the *Stuart* court's concern).

230. *See Kelly*, 249 F. Supp. 2d at 285; *Stuart*, 11 F. Supp. 2d at 224.

231. *Stuart*, 11 F. Supp. 2d at 224.

232. *See Kelly*, 249 F. Supp. 2d at 285-86.

233. *See id.* at 285. The court noted that:

> The Court believes that when deciding whether jurisdiction exists in a petition for confirmation of an arbitration award, the amount in controversy is the value of the award itself to the petitioner. . . . If the award itself were the sole determinant, the numeric value of the arbitrator's award would be zero in a case where a defendant had prevailed in the arbitration. This is why the true value of the award in such cases should be measured by the value of the award to the petitioning defendant. This can be achieved by looking to the underlying complaint because this is the value to the defendant of prevailing in the arbitration.

Id. Although the *Kelly* court's general rule of looking to the award in arbitration appears to violate jurisdictional, fairness, and arbitration principles for the reasons discussed herein with respect to petitions to vacate, we will save the debate over petitions to confirm for another article. For now, the court has at least addressed the concern of allowing one party more access to federal review, and has done so by recognizing the of looking to the underlying arbitration demand.

234. *See supra* notes 102, 136-37 and accompanying text; *see also* Bull HN Info. Sys., Inc. v. Hutson, 229 F.3d 321, 329 (1st Cir. 2000).

vacatur of any arbitral award can be determined from the good faith demand in the arbitration. If the amount sought is less than the jurisdictional minimum, any vacatur action must be brought in state court. If the amount sought is more than $75,000, the vacatur petition can be filed with the federal court. No matter the arbitration award, the parties will stand on equal footing as to which court may hear the petition.

In the same way, the arbitration demand approach reduces the guesswork. Rather than parties waiting until the end of the arbitration proceedings to determine which court is appropriate for the vacatur petition, adversaries will understand where the petition need be filed from the time of the plaintiff's filing of his or her demand.

B. Does the Method Treat Arbitrating Parties Fairly as Compared to Traditional Litigants?

The second fairness factor considers whether the system is treating arbitrating parties fairly in relation to their traditional-litigation counterparts. Whether the arbitral parties are treated fairly, or perceive themselves as being treated fairly, may depend not only on how the parties are treated as compared to each other, but also how they are treated as compared to traditional litigants. The mere fact that a traditional litigant may have access to certain opportunities unavailable to the arbitrating party is not alarming in and of itself. That is the nature of arbitration.[235] Whether the difference is enough to deter parties from turning to arbitration in the first place is a whole different issue. Or viewed from an efficiency rather than fairness analysis, one would query whether the advantages of arbitration outweigh what one is trading away.

Under the arbitration award approach, what the arbitrating party may be trading away is, again, federal review. If the arbitration demand is more than $75,000, yet the award is less, diversity jurisdiction will not exist for a federal court to hear the petition.[236] Under *the exact same circumstances* in traditional courtroom litigation – where the plaintiff demands in good faith more than $75,000, but is awarded less than that amount—the federal court will hear the appeal.[237] If a party is not willing to make that trade, the policy goals underlying arbitration are, again, defeated.

From a more fundamental and holistic perspective, there appears to be no rational basis for the distinction. If the federal court can hear an appeal of the exact same issue from a traditional litigant, why can the federal court not hear the same "appeal" of an arbitration award, particularly since the constricted standard of review simplifies the issues before the court? The arbitration demand approach makes no such artificial distinction, but rather harmonizes the scenarios.

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235. *See supra* notes 13-18 and accompanying text.
236. *See supra* notes 64-95 and accompanying text.
237. *See supra* notes 51-53 and accompanying text.

C. Is the Process Internally Consistent?

Balancing fairness and efficiency begs the further question of whether courts are internally consistent when determining the amount in controversy with respect to petitions under the FAA, or, whether the courts' reliance on one approach results in inconsistent jurisdictional determinations, thereby creating inefficiencies and the perception of unfairness.

Looking to the way courts handle the amount in controversy in petitions to compel arbitration suggests that the arbitration award approach creates these inconsistencies. The petition to vacate is not the only petition available to arbitrating parties under the Federal Arbitration Act. The Act also provides that, when a contracting party fails to honor an agreement to arbitrate that is covered by the Act, the other contracting party may

> petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.[238]

In examining diversity jurisdiction in a petition to compel arbitration, courts generally agree that the amount in controversy is the amount at stake (or put another way, the amount that could be awarded) in the underlying arbitration.[239]

Given that courts look to what is in essence the arbitration demand approach in determining the amount in controversy in a petition to compel arbitration, [240] if a court looks to the arbitration award approach in a petition

238. 9 U.S.C. § 4 (2000).

239. *See, e.g.*, We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 841 (7th Cir. 1999) ("[S]ince the present suit is not a removal suit but rather an independent federal suit, it is the stakes of the arbitration and not the possible state court award that control, and an arbitrator could award more than the amount sought in the state court complaint."); Webb v. Investacorp., 89 F.3d 252, 256 (5th Cir. 1996) ("We are persuaded that *Davenport* [241 F.2d 511, 514 (2d Cir. 1957)] and its progeny state the correct rule in holding that the amount in controversy in a motion to compel arbitration is the amount of the potential award in the underlying arbitration proceeding."); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) ("Thus the amount in controversy in a petition to compel arbitration or appoint an arbitrator is determined by the underlying cause of action that would be arbitrated."); Davenport v. Procter & Gamble Mfg. Corp., 241 F.2d 511, 514 (2d Cir. 1957) ("In considering the jurisdictional amount requirement the court should look through to the possible award resulting from the desired arbitration, since the petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award."); *see also* America's Moneyline, Inc. v. Coleman, 360 F.3d 782, 786 (7th Cir. 2004) ("In the context of actions to compel arbitration, we have adhered to the rule that, in order to ascertain whether the jurisdictional amount for the diversity statute has been met, the appropriate focus is the stakes of the underlying arbitration dispute.").

240. Courts likely phrase this test slightly differently from the arbitration demand approach because a demand for relief in arbitration is often not made by the time the petition to compel arbitration is ruled on. *Cf. Jumara*, 55 F.3d at 877 ("Thus the amount in controversy in a petition to

to vacate, it is applying two diametrically opposing jurisdictional tests to the same case, albeit at different stages of the litigation. Proponents of the arbitration award approach may argue that this is acceptable, and that petitions to compel and petitions to vacate are as different as apples and oranges. The petition to compel is typically filed near the beginning of the case, when the total amount in dispute is still what the plaintiff can expect to recover. The petition to vacate is filed after an arbitrator makes an award, and challenges only the award; therefore, the amount at issue between the parties is the award and nothing else.

Not only is this view contrary to the traditional time of filing and legal certainty doctrines, as discussed above,[241] but it may result in significant inefficiencies. The fact that the petition to compel may be heard by the federal court, but the petition to vacate in the same case may not, could result in the same case being heard by three separate jurisdictions: the federal court, then the arbitrator, and then the state court.

Consider the following hypothetical. Corporation X sues corporation Y in federal court for $150,000. Corporation Y petitions the federal court to refer the matter to arbitration, based on the earlier agreement of the parties. The federal court grants the petition. The arbitrator then hears the matter and awards Corporation X $60,000. Corporation Y then petitions the federal court to vacate the arbitration award. Under the arbitration award approach, the federal court would not have jurisdiction to hear the petition – despite the fact that it heard the earlier petition to compel arbitration in the exact same case – because the arbitrator's award is below the jurisdictional minimum. Corporation Y has no choice but to petition the state court for relief, meaning that a third "court" exercises jurisdiction over the same case. The inefficiencies in such an approach are apparent.

Under the arbitration demand approach, however, whether the federal court has diversity jurisdiction to hear the petition to vacate is based on the same standard as whether it has jurisdiction to hear the petition to compel. The amount in controversy is determined in both cases based on the amount of the original demand. By harmonizing the two jurisdictional determinations, the arbitration demand approach reduces the inefficiencies, thereby promoting the policy goals of arbitration.[242] Harmonizing the two determinations also bolsters the trust in the judicial system in the eyes of

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compel arbitration or appoint an arbitrator is determined by the underlying cause of action that would be arbitrated."). Where a demand has been made, courts have looked to that amount as the measure of the test of the amount at stake in the arbitration. *See, e.g.*, *Webb*, 89 F.3d at 256-57. The court held that:

> We are persuaded that *Davenport* and its progeny state the correct rule in holding that the amount in controversy in a motion to compel arbitration is the amount of the potential award in the underlying arbitration proceeding. . . . Therefore, the district court properly looked to the amount of Investacorp's claim in the underlying arbitration to determine the amount in controversy in this action for declaratory relief.

Id.

241. *See supra* Part IV-C.

242. *See supra* notes 216-22 and accompanying text for further discussion of the policy goals of arbitration.

parties and laypeople who do not understand the legal fictions that lawyers and courts often create.

VI. CONCLUSION

Paul Simon may be correct. There may be fifty ways to leave your lover. And in an arena so sensitive as the termination of a romantic, perhaps forbidden, relationship, one may need a variety of options for ceasing the involvement. Not so with the amount in controversy in a petition to vacate an arbitration award. The arbitration demand approach is enough. It is the only one of the three current approaches that remains true to traditional notions of jurisdiction by determining the amount in controversy at the initiation of the controversy, not at the point of what is essentially an appeal. The arbitration demand approach also best balances efficiency and fairness. This approach treats the arbitrating parties fairly as compared to each other and traditional litigants, and ensures that amount in controversy determinations in hearings on FAA petitions are consistently applied. Protecting traditional jurisdictional and arbitration principles should be the goal, not merely an option.

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